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No. 82-266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Michelin Tire Corporation and La Manufacture Francaise Des Pneumatiques Michelin,
Petitioners,

v.

MAUDELL H. FALLAW; FLETCHER L. FALLAW;
SOUTHEASTERN FREIGHT LINES,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Were the District Court and the Court of Appeals below correct in denying a new trial upon a finding that there was no showing of intentional concealment or actual bias as a result of jury nondisclosure on *voir dire*?

LISTING PURSUANT TO SUPREME COURT RULE 28.1

The corporation Southeastern Freight Lines has no parent companies, subsidiaries or affiliates.

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OPINIONS BELOW

Both the unpublished opinion of the United States Court of Appeals for the Fourth Circuit and the oral pronouncement made (in lieu of a written opinion) by the United States District Court for South Carolina are set out in the Appendix to the petition for a writ of certiorari.

STATEMENT OF THE CASE

These product liability actions were initiated to recover for the injuries and damages to Fletcher L. Fallaw, the injured driver, Maudell H. Fallaw, his wife, and Southeastern Freight Lines, all of which came about as a result of a defective Michelin* tire which blew out and caused a collision between a tractor-trailer rig and a tanker rig on July 15, 1975. As a result of that collision, Mr. Fallaw sustained severe and permanent brain damage requiring numerous hospitalizations and institutionalization for the remainder of his life. Mr. Fallaw was 52 years old at the time of his injury. The jury returned a verdict on March 30, 1981, assessing damages as follows: Mr. Fallaw: $1,250,000.00; Mrs. Fallaw's consortium claim: $100,000.00; and Southeastern's property damage claim: $20,500.00.

During *voir dire*, the entire jury venire was questioned by the district court judge as follows:

> Have any of you ever been a Plaintiff or a Defendant in an action brought for damages? If so, please stand and give your name.
>
> Has anyone ever sued you or have you ever sued anybody for money as a result of damages or injuries you or that other person allegedly sustained? If so, please stand.

Mrs. Caryl C. Polk, who did not respond, was selected as a juror by the parties. After the testimony and closing arguments by counsel were completed, Mrs. Polk was appointed as the foreperson as the district judge felt that she was the best qualified because of her close attention to the case. Some weeks after the jury had returned a verdict and

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* The Petitioners, Michelin Tire Corporation and La Manufacture Francaise Des Pneumatiques Michelin, shall be collectively referred to herein as "Michelin".

was discharged from the case, Michelin discovered that Mrs. Polk had brought a suit as a result of an automobile accident which occurred seven years earlier in 1974 and that she had also been involved in an automobile accident in December of 1980. This information was discovered by Michelin prior to a full evidentiary hearing which the district court held on July 9, 1981, wherein Mrs. Polk was subpoenaed by Michelin and testified concerning these accidents.

During the evidentiary hearing, Mrs. Polk, who had a hearing problem, tesitified she was not seated in the jury box during *voir dire*, but was in the rear of the courtroom with all other potential jurors. She had never been on a jury panel nor had she ever been in a courtroom. She testified that she did not hear the question concerning whether or not she had been sued or had sued anyone. Mrs. Polk stated that she did not intentionally or deliberately withhold information from the court and the trial judge so found.

The circumstances surrounding Mrs. Polk's automobile accident in 1974 did not bear any similarity to the circumstances resulting in the injury to Mr. Fallaw. She was a passenger in a stopped car which was rear-ended and no blowout was involved in that incident. Likewise, the injuries received in 1974 by Mrs. Polk in no way resembled or compared to those received by Mr. Fallaw and did not require hospitalization.

It is not clear whether Mrs. Polk filed suit with regard to the incident which occurred in December of 1980, however, the circumstances surrounding that incident were likewise not similar to the case at hand in that Mrs. Polk's incident involved her hitting a car which failed to stop for a stop sign. Again, no hospitalization was required. The trial judge ruled that Mrs. Polk had not failed to answer fully the *voir dire* questions as far as the 1980 incident was concerned. Mrs. Polk never made either the 1974 or 1980 automobile incidents known to any of the other jurors. The trial judge found, after

the evidentiary hearing, that Mrs. Polk did not intentionally fail to answer *voir dire* questions and that her experiences did not prejudice Michelin.

During *voir dire*, the court also propounded the following question to the entire jury venire:

> Have any of you or members of your immediate family, close friends or business associates ever operated or been a passenger in a vehicle when a tire blew out? If so, please stand and explain the circumstances.

In post-trial questioning, by means of a telephone survey, Michelin discovered that the juror Mrs. Pennington had been operating a vehicle when a tire blew out. She was subpoenaed by Michelin to testify at the evidentiary hearing regarding that incident.

During the hearing, Mrs. Pennington testified she was also seated in the audience with all other prospective jurors, as opposed to the jury box, and that this was her first experience in court. She did not recall her experience with the blowout at the time of *voir dire* because it was so insignificant and because it had occurred approximately ten years earlier in the late sixties or early seventies. She did not recall the experience until she was questioned during a lengthy phone conversation by counsel for Michelin after she had been dismissed by the court in the case. The experience that Mrs. Pennington had was not in any way similar to the facts in the case at hand. She did not remember the kind of tire involved or the nature of the problem with the tire, nor did she consider the tire to be defective in any way. She received no injuries nor filed a lawsuit as a result of the incident. She also testified that at no time did she knowingly withhold any information from the court.

Michelin learned for the first time during the post-trial evidentiary hearing on the motion for a new trial that Mrs. Carrigg, one of the jurors whom it had subpoenaed, had an experience comparable with a blowout a few years prior. Mrs.

Carrigg had steered her vehicle into a curb to avoid being hit by another vehicle and the impact with the curb caused her tire to deflate. Her experience in this instance was not similar to any of the facts in the case under consideration.

In determining whether to grant Michelin's motion for a new trial based on juror misconduct or impartiality, the district court applied a two-pronged test; *i.e.*, was the non-disclosure (1) intentional or (2) otherwise prejudicial. The court found that none of the jurors intentionally withheld information. Furthermore, the court concluded that juror Polk's litigation experience did not raise any inference or possibility of prejudice. Concerning the prior blowout experiences, the court found that juror Pennington had not recalled her experience with a blowout during *voir dire*, and expressed doubt that juror Carrigg actually had a blowout. Moreover, the court determined that both experiences were unlike the accident in the present case. Lastly, the court concluded that none of the jurors had discussed their experiences with any other jurors.

Contrary to Michelin's representation that juror non-disclosure must be intentional to warrant a new trial, the Fourth Circuit Court of Appeals, in a *per curiam* opinion applied the same two-pronged test as the district court in analyzing the post-verdict evidence. The court held:

> With respect to all three jurors, the district court found the absence of any intention to withhold information, and we accept that finding as not clearly erroneous. Had there been deliberate untruthfulness, at least when compounded by possible bias, defendants would have been entitled to a new trial. *See United States v. Bynum*, 634 F.2d 768, 771 (4 Cir. 1980); *McCoy v. Golstein* [sic], 652 F.2d 654, 658 (6 Cir. 1981). *But, here, where the non-disclosure was not deliberate, the only inquiry is whether the jurors' post-verdict responses disclosed actual bias or prejudice as a matter of law. See United States v. Vargas*, 606

> F.2d 341, 334 (1 Cir. 1979); *United States v. Mulligan*, 573 F.2d 775, 777 (2 Cir.), *cert. denied*, 439 U.S. 827 (1978). We think that these jurors' answers did not satisfy this test.

Appendix to the Petition at 5a (emphasis added). In essence, both the district court and the circuit court reviewed the evidence for some showing of actual bias, and found none.

REASONS FOR DENYING THE WRIT

As Chief Justice Hughes observed in *United States v. Wood*, 229 U.S. 123, 145-46, *rehearing denied*, 299 U.S. 624 (1936):

> Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.

In the present case, the juror nondisclosures were not discovered until after the verdict had been rendered. To determine whether there had been an impartial trial, the district court held a post-verdict hearing in accordance with the decisions of this Court. *See Smith v. Phillips*, ____ U.S. ____, 102 S. Ct. 940 (1982). No prejudice was found by the trial judge. On appeal, the Fourth Circuit Court of Appeals carefully scrutinized the record to determine whether the nondisclosures evidenced prejudice. No demonstration of manifest prejudice was found. *See Irvin v. Dowd*, 366 U.S. 717, 723-24 (1961) (recognizing that trial court determination of impartiality should only be set aside where prejudice is manifest). Michelin has been afforded a full and fair hearing and a review of the merits of its claim. Not satisfied, it now seeks a grant of certiorari to obtain a further ruling by the United States Supreme Court on a matter which, it asserts, has never been expressly addressed by this Court. There is, however, no reason why this Court should address this issue. As Chief Justice Hughes pointed out, there are no constitutional issues

presented by the procedure or test used to determine impartiality. *See United States v. Wood, supra.* Simply because a question has not been resolved by this Court is not a basis for the grant of certiorari.

1. Michelin misinterprets the case law when it initially argues that the Fourth Circuit Court of Appeals below has rendered a decision in conflict with other federal circuit courts, inferring that some circuits require a showing of intentional jury nondisclosure in order to warrant a new trial. (Michelin's Petition p.4). While intentional or deliberate nondisclosure may be significant in proving or even presuming juror impartiality, the central and ultimate issue concerns actual bias or prejudice, and when proved, a new trial may be ordered even if the nondisclosure was innocent. In this regard, there is no real conflict among the federal circuit courts. The uniform rule is that a new trial will not be granted simply because a juror fails to properly disclose information on *voir dire*. Rather, when the issue of juror partiality is raised, the unsuccessful litigant is required to show actual prejudice. All circuit courts have had occasion to apply this uniform rule. *United States v. Vargas*, 606 F.2d 341, 344-45 (1st Cir. 1979); *United States v. Mulligan*, 573 F.2d 775, 777-78 (2nd Cir.), *cert. denied*, 439 U.S. 827 (1978); *United States v. Woods*, 364 F.2d 481-483 (3rd Cir.), *cert. denied*, 385 U.S. 972 (1966); *Vezina v. Theriot Marine Service, Inc.*, 554 F.2d 654, 656 (5th Cir. 1977); *United States v. Robbins*, 500 F.2d 650, 653 (5th Cir. 1974); *McCoy v. Goldston*, 652 F.2d 654, 658-59 (6th Cir. 1981); *United States v. Currie*, 609 F.2d 1193, 1194 (6th Cir.), *cert. denied*, 445 U.S. 928 (1980); *Stanczak v. Pennsylvania Railroad*, 174 F.2d 43, 48 (7th Cir. 1949); *United States v. Whiting*, 538 F.2d 220, 223 (8th Cir. 1976); *United States v. Sockel*, 478 F.2d 1134, 1137 (8th Cir. 1973); *Jackson v. United States*, 408 F.2d 306, 309 (9th Cir. 1969); *Williams v. United States*, 418 F.2d 372, 377 (10th Cir. 1969); *Rogers v.*

McMullen, 673 F.2d 1185, 1188-90 (11th Cir. 1982); and *Carpenter v. United States*, 100 F.2d 716, 717 (D.C. Cir. 1938).

In the case at hand, the Fourth Circuit below addressed the issue as to whether or not the nondisclosures were intentional, but more importantly, it addressed the issue of juror impartiality, and found that the jurors' post-verdict responses did not disclose actual bias or prejudice as a matter of law.

Decisions of this Court lend firm support to the rule developed in the federal circuits. In a variety of circumstances evidencing potential juror partiality, this Court has repeatedly held that absent a showing of actual bias, there is no basis for granting a new trial. *See Smith v. Phillips*, *supra*, 102 S. Ct. at 945-46 (juror had job application pending with prosecutor's office during criminal trial); *Chandler v. Florida*, 449 U.S. 560, 581-82 (1981) (radio, television and photographic coverage of criminal proceedings); *Beck v. Washington*, 369 U.S. 541, 557-58, *rehearing denied*, 370 U.S. 965 (1962) (potentially inflammatory pretrial publicity); *Dennis v. United States*, 339 U.S. 162, 171-72, *rehearing denied*, 339 U.S. 950 (1950) (juror's occupation as government employee); *United States v. Reid*, 12 How. 361, 366 (1851) (jurors read newspaper accounts of prosecution while trial was still in progress). Thus, alleged unfairness as a result of juror bias must be sustained, not as a matter of speculation, but as a demonstrable reality. *Darcy v. Handy*, 351 U.S. 454, 462 (1956).

Michelin's claim of disagreement among the circuits is based on the decisions in *Photostat Corporation v. Ball*, 338 F.2d 783 (10th Cir. 1964) and *Consolidated Gas & Equipment Company of America v. Carver*, 257 F.2d 111 (10th Cir. 1958). It is noteworthy that the Tenth Circuit Court of Appeals recognized the uniform burden regarding a showing of juror prejudice in stating:

In Consolidated Gas and Equipment Company of America

> *v. Carver*, 10 Cir., 257 F.2d 111, we recognized the burden on the complaining litigant in a post-verdict hearing to show that failure of a juror to fully and truthfully answer questions propounded to the panel concerning his experience in similar litigation resulted in prejudice to his cause. We embraced the settled rule which moves the court to act only upon a showing of probable bias of the juror with consequent prejudice to the unsuccessful litigant.

Photostat Corporation v. Ball, *supra*, 338 F.2d at 786. Both *Photostat* and *Consolidated* indicated that juror nondisclosure on *voir dire* substantially impaired the right of peremptory challenge and, hence, established an irrebuttable presumption of prejudice, however, these cases have no precedential value. First, each case involved an extraordinary fact situation. In *Consolidated*, a juror failed to disclose his own pending action for damages based on serious injuries remarkably similar to those suffered by the plaintiff in the suit for which he was chosen as a juror. In *Photostat*, four jurors failed to disclose at least ten different claims and accidents. In the present case, the nondisclosures did not conceal an extreme similarity of circumstances as in *Consolidated* nor did they approach the number of nonresponsive answers found in *Photostat*. Second, the state court precedent upon which both cases relied has been significantly underminded. *See Beanland v. Chicago, Rock Island & Pacific Railroad*, 345 F. Supp. 227, 229 (W.D. Mo. 1972). Third, more recent case law demonstrates that the Tenth Circuit is in accord with the uniform rule:

> In the absence of a showing of actual bias or an intentional withholding of the facts, there is little in the record from which the court can conclusively presume that the non-disclosure was obvious disqualification and inherent prejudice as a matter of law.

Williams v. United States, *supra*, 418 F.2d at 377 (footnote omitted) (fact that juror might have been peremptorily

challenged is not alone sufficient to reverse). Michelin fails to mention in its petition this more recent pronouncement by the Tenth Circuit Court of Appeals. Thus, Michelin's claim that the federal system lacks a consistent analytical approach to the effect of juror nondisclosure on *voir dire* is without merit.

2. Michelin's second ground for review rests on the contention that nondisclosure on *voir dire* constitutes an impairment of the right to exercise peremptory challenges. Hence, Michelin states that the applicable decisions of this Court mandate a new trial without a showing of prejudice, citing *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (Michelin's Petition p.7). Michelin's argument is fatally flawed because it would lead to an absurd result. If every nondisclosure, no matter how inadvertent or harmless, is considered automatic grounds for a new trial, litigation often will be unconscionably prolonged. As Mr. Justice Holmes pointed out in a case involving alleged juror bias, "[i]f the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day." *Holt v. United States*, 218 U.S. 245, 251 (1910). That no due process violation was committed was further confirmed just this year by this Court in *Smith v. Phillips*, *supra*.

> [D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ... held in this case.

102 S. Ct. at 946 (footnote omitted). *See also United States v. Vargas, supra,* 606 F.2d at 346 (holding that right of peremptory challenge was not impaired absent showing juror nondisclosure actually prejudiced case); *Williams v. United States, supra,* 418 F.2d at 377 (to the same effect). This Court also said in *Smith v. Phillips*:

> This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias.

102 S. Ct. at 945.

3. Michelin, as a third ground for relief, contends that the disunity in the federal system on the question presented creates unfairness. As previously stated, there is no disunity among the federal circuit courts. Hence, Michelin's claim is unsound.

In sum, the only real question posed by Michelin in its petition turns on the particular facts of this case and is of interest solely to the parties involved. In essence, Michelin asks this Court to make a third review of the post-verdict hearing record to see if it can find what two other federal courts have been unable to find – proof of juror partiality. This Court has held that such fact canvassing is not appropriate under a grant of certiorari and that this Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson,* 268 U.S. 220, 227 (1925). Certiorari, therefore, should be denied in the present case based on the above authority.

CONCLUSION

For the above-stated reasons, the Respondents respectfully request that the petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit be denied.

Respectfully submitted,

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